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THE MICHIGAN JUDICATURE ACT OF 1915.

III. PARTIES TO ACTIONS.

IT would not be worth while to discuss all the provisions which the Judicature Act has made on the subject of parties to actions, but certain features of this legislation which are deemed particularly novel and important will be briefly treated under the following heads:

I. ACTIONS TO BE BROUGHT IN THE NAME OF THE REAL PARTY IN INTEREST.

The Judicature Act provides that "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."

This provision was taken almost literally from the New York Code of Civil Procedure and is found in substantially identical form in practically all the so-called "codes."[1] It has been subjected to sixty-five years of litigation for the purpose of construing its meaning, so that at the present time this statute is pretty well understood. Since the provision has been adopted from the "code" it must follow that its interpretation by the "code" courts has also been adopted, and it will therefore be comparatively easy to summarize its effect.

In the first place, while the different codes vary in the verb employed, some using "must" and some "shall," these words seem to be treated as equivalents, and the rule is that the statute is mandatory.[2]

[1] It adopts the literal phraseology of the Iowa Statute, except that it substitutes "shall" for "must." Iowa Code, 1897, § 3459.

[2] Eaton v. Alger, 57 Barb. (N. Y.) 179; Chase v. Dodge, 111 Wis. 70; Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258.

The term "real party in interest" suggests on its face that it has reference only to the person who would gain or lose as the result of the controversy, or, in other words, to the holder of the beneficial interest. In which case an assignee of a chose in action for collection, who is bound to turn over the avails of the suit to his assignor, would not be the real party in interest and could not sue.[3] Under this view the Michigan case of *Moore* v. *Hall*,[4] which sustained the right of an agent to whom negotiable paper had been indorsed for collection, to sue thereon in his own name, would no longer be good law.

But the great majority of code states have taken a more practical view of the statute, and have found its meaning in the purpose which it was obviously intended to serve, namely, to introduce the equity rule that the action was to be brought by any party who was in a position to get a judgment which would bar further litigation. Thus, in *Sturgis* v. *Baker*,[5] the Supreme Court of Oregon said: "The statute requiring that every action shall be prosecuted in the name of the real party in interest was enacted for the benefit of a party defendant, to protect him from being harassed for the same cause. But if not cut off from any just offset or counter-claim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. This is the test as to whether such a defense is properly interprosed." And in *Geiselman* v. *Starr*,[6] the Supreme Court of California said: "Where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest." This test has been approved by many courts and is supported by the great weight of authority under the code.[7]

The beneficial interest in the result of the action is such an interest as satisfies the equity rule, for one who holds such an interest is clearly in a position to get a judgment which will end the litigation

[3] See Stewart v. Price, 64 Kan. 191, where the majority of the court strongly argue the correctness of this view. This case was expressly overruled two years later by Manley v. Park, 68 Kan. 400.

[4] 48 Mich. 143.

[5] 43 Ore. 236.

[6] 106 Calif. 651.

[7] Greene v. McAuley, 70 Kan. 601; Chouteau v. Boughton, 100 Mo. 406; Hays v. Hathorn, 74 N. Y. 486; Seybold v. Grand Forks Nat. Bank, 5 N. D. 460; Chase v. Dodge, 111 Wis. 70; Elmquist v. Markoe, 45 Minn. 305.

so far as the defendant is concerned. Hence such an interest will constitute one the real party in interest under the new Judicature Act.[8]

But a naked legal title is also one upon which a valid judgment can be founded, and such a title is enough to constitute the holder the real party in interest, although he has no beneficial interest whatever. Thus it has been held that the plaintiff was the real party in interest when he sued as assignee for collection only of a claim for wages,[9] when he sued as assignee of a claim for breach of contract of employment, when the assignment was merely colorable as between the parties,[10] where he sued as assignee of an assignable tort claim, the transaction being without consideration and merely for the purpose of preventing a removal to the federal courts,[11] and where he sued as assignee for a foreign corporation which was not entitled to sue, there being no consideration for the assignment and the corporation being by agreement entitled to whatever should be recovered.[12] As said by the United States Circuit Court of Appeals in *Kent* v. *Dana*,[13] "Where, as in Ohio, the code of procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defense to the maker to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably [*sic*], or merely for the purpose of collection, and that it is sufficient if he have the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor." One who holds the legal title is entitled to sue as real party in interest even against the will of the owner of the entire beneficial interest.[14]

It will follow from these authorities that any party who has heretofore been entitled to sue in his own name in Michigan must be the real party in interest under the new Act, for clearly a judgment obtained by any such plaintiff would be a complete protection to the defendant from further litigation on the same cause of action. Therefore it may safely be said that so far as this provision goes it does not *prevent* anyone from suing who could have sued under the former practice.

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[8] Swift & Co. v. Wabash R. R. Co., 149 Mo. App. 526.
[9] Falconio v. Larsen, 31 Ore. 137.
[10] Friedman v. Schulman, 46 Misc. (N. Y.) 572.
[11] Vimont v. Chicago etc. R. R. Co., 64 Ia. 513.
[12] Citizens' Bank v. Corkings, 9 S. D. 614.
[13] 100 Fed. 56; 40 C. C. A. 281.
[14] Greene v. McAuley, 70 Kan. 601.

Accordingly, if the new statute as to the real party in interest is to introduce any change in the practice it must be in the direction of enlarging the class of persons who are authorized to sue in their own names.

It must be admitted that the prior practice as to parties plaintiff in this state was in some respects very liberal. By statute we had authorized actions by assignees in their own names,[15] which covered a substantial portion of the field intended to be covered by the code through its "real party in interest" rule.[16] And the decisions of the Supreme Court of this state have in several instances shown a surprising indifference to forms and technicalities. One of the most remarkable of these decisions is *Watson* v. *Watson*,[17] where a woman of full age brought an action in her own name against defendant for her own seduction, and the objection was made that the statute did not authorize an action in her name. It was conceded that the statute did not expressly authorize such an action, but on the contrary it expressly provided that she might authorize her father or any other relative to bring the action in her behalf and for her use and benefit. The court held that in spite of the want of authority in the statute and in spite of the provision as to an action in her behalf by her father or other relative, she might nevertheless prosecute the action in her own name. And in justification of this holding the court said:—"The policy of legislation in this state has been to permit the real party to bring an action in his or her own name and testify in his or her own behalf. It is no longer necessary for assignees to sue in the name of the assignor or to bring an action in the name of one person for the use and benefit of another, even in cases of tort where the action is assignable."

This was a very advanced position for the court to take, and doubtless was a case of judicial legislation, but it was in the interest of directness and simplicity in procedure. It indicated a policy in harmony with the object now sought to be accomplished by the legislature through the rule under discussion. And the court has very recently given expression to views almost literally identical with some of those quoted above from the decisions in code states. In *Union Ice Co.* v. *Detroit & Mackinac Ry. Co.*,[18] the insured sued a tortfeasor for causing the loss of its building by fire, and it was claimed that subrogation agreements with various insurance companies were relevant evidence, but the court held otherwise, saying: "The de-

[15] How. St. (2nd Ed.) § 12704.
[16] Pomeroy's Code Remedies (4th Ed.) § 63.
[17] 49 Mich. 540.
[18] (1914) 178 Mich. 346.

fendant is interested only in knowing that a judgment, in the suit brought, will relieve it from all liability for the consequences of its tort," thereby suggesting the equity rule as to who might properly prosecute an action.

But there has not been an entirely consistent policy in this regard on the part of the court. Thus, in *Richelieu & Ontario Navigation Co.* v. *Thames & Mersey Ins. Co.*,[19] the plaintiff chartered a steamship to the Owen Sound Steamship Co., under an agreement that the charterer should keep the vessel insured. A policy of insurance was taken out by the charterer in the defendant company, and the premium was paid by the charterer. The policy contained an agreement that the loss should be paid to the plaintiff. The court said: "It was understood by the defendant that the insurance was in fact made for plaintiff's benefit, and it was really so made. A payment to plaintiff would absolve defendant from any duty to the Owen Sound Steamship Company, if any such duty existed. Under such circumstances we think the defendant entered into contract relations which plaintiff has a right to assert directly."

This is a direct holding that where two persons make a contract for the sole benefit of a third person, such third person may sue thereon in his own name, though he is a stranger to the consideration and not a party to the promise.

But where a husband bought an interest in a farm under an agreement with the grantor that he would live on the farm and work it, but if he died before his interest was paid for the grantor should refund to the grantee's wife the payments already made, it was held that the wife could not sue.[20] The court said: "She was not a party to the contract and had paid none of the consideration * * * This case comes within the general rule that a promise made by one person to another for the benefit of a third person, a stranger to the consideration, will not support an action by the latter."[21] And in *Linneman* v. *Moross' Estate*[22] it was held that where property was conveyed by a father to his son in consideration of the son's promise to pay the grantor's daughter $10.00 a week, no action at law could be maintained on this promise by the daughter.

Now it is quite clear that all three of these cases are identical in principle, for in each a sole beneficiary sought to enforce a contract made between others. If the first case was right the second and third

[19] 58 Mich. 132.

[20] Wheeler v. Stewart, 94 Mich. 445.

[21] Citing Pipp v. Reynolds, 20 Mich. 88; Hidden v. Chappel, 48 Mich. 527; Edwards v. Clement, 81 Mich. 513; Hunt v. Strew, 39 Mich. 368.

[22] 98 Mich. 178.

were wrong. If want of priority is the only objection to a sole beneficiary suing in his own name, will these cases which deny the right to sue be affected by the new provision as to the real party in interest?

Another common situation is where a debtor contracts with another to pay his debt, as when a grantee of land subject to a mortgage promises his grantor to pay the mortgage debt. Can the mortgagee sue the grantee on this contract? Our court has held that creditors cannot recover upon an agreement made by a third person with the debtor to pay their claims, to which they are not parties, and which has not been assigned to them.[23] Will the new Act change this?

The provision as to the real party in interest was doubtless intended to authorize actions to be brought directly by the very person who is substantially and beneficially interested in the result, and if the sole beneficiary of a contract has any real interest in its performance he ought to be able to sue upon it. It may be that the real question here is rather one of right than of remedy. But it is certainly true that many courts have held that the code provision as to the real party in interest does authorize on action by the sole beneficiary of a contract made by and between others. Thus in *Paducah Lumber Co.* v. *Paducah Water Supply*,[24] the Supreme Court of Kentucky said: "This court has held the doctrine well settled, a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him (*Smith* v. *Lewis*, 3 B. Mon., 229; *Allen* v. *Thomas*, 3 Met. 198), which practice is not only in accordance with the rule found in Chitty on Pleading, but seems to be required by section 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that under section 21 a fiduciary or trustee *may* bring an action without joining with him the person for whose benefit it is prosecuted." And the Supreme Court of Missouri, in *Ellis* v. *Harrison*,[25] held that a person for whose benefit an express promise is made, in a valid contract between others, may maintain an action upon it in his own name, and justified the ruling as follows: "By our code of procedure, it is provided that every action shall be prosecuted in the name of the real party in interest, with certain exceptions; one of which is that the trustee of an express trust may sue in his own name. The statute then declares that such a trustee 'shall be construed to include a person with whom, or

[23] Edwards v. Clement, 81 Mich. 513.
[24] 89 Ky. 340, 347.
[25] 104 Mo. 270, 277.

in whose name, a contract is made for the benefit of another.' R. S. 1889, secs. 1990, 1991. Reading these sections together, it would seem to be clearly implied that the beneficiary in such a contract is to be regarded as the real party in interest, and that, as such, he may sue thereon in his own name; while on the other hand, the contracting party (as trustee of an express trust, within the statutory definition) may likewise maintain an action on the same contract."

That the real objection to such actions heretofore recognized in this state is the technical one of want of privity to support the title of the plaintiff in an action at law and not the substantial want of a right in the plaintiff, is indicated by what our court said in *Palmer* v. *Bray*,[26]:—"It has been repeatedly held by this court that in a suit in equity a person for whose benefit a promise is made may enforce it in his own name." This would imply that now, when a legal title is no longer necessary to support an action at law, a legal action may properly be brought by the beneficiary of a contract made by and between others.

This doctrine should doubtless include a contract made by a debtor to pay the debt to a third person, as where a grantee of land subject to a mortgage promises his grantor to assume the mortgage debt. It cannot be objected that there is no right in the mortgagee, for our statute expressly creates it.[27] "Such an agreement, though made with the grantor of the property, inures to the benefit of one having a mortgage upon it."[28] That being so it would follow that the mortgagee would be the real party in interest and the proper plaintiff in an action at law. This is clearly stated by the Supreme Court of Colorado in *Starbird* v. *Cranston*,[29] where the court says:—" 'According to this generally accepted view, the liability of the grantee, who thus assumes the payment of an outstanding mortgage, does not depend upon any extension of the equitable doctrine concerning subrogation; it is strictly legal, arising out of a contract binding at law; the mortgagee, instead of enforcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.' * * * Under our code the action must be prosecuted in the name of the real party in interest; and certainly the beneficiary, or person for whose benefit the promise is made, is the real party in interest, whether the promise is evidenced by a simple contract or one under seal."

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[26] 136 Mich. 87.
[27] How. St. (2nd Ed.) § 12037.
[28] Kollen v. Sooy, 172 Mich. 214, 219.

2. NON-JOINDER AND MIS-JOINDER OF PARTIES.

"No action at law or in equity shall be defeated by the non-joinder or mis-joinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the case, as the ends of justice may require."[30] This provision was taken from the New Jersey practice act of 1912.[31] Up to the present time no decisions have been published in New Jersey construing this provision, but inasmuch as New Jersey took the provision in substance from Order 16, rule 11, of the English Supreme Court Rules, the decisions in England as to the meaning and scope of those portions of the rule which correspond to the New Jersey and Michigan statutes would be authoritative adjudications.

The Judicature Act cannot be taken as intending any change in rights or liabilities. Thus in *Kendall* v. *Hamilton*,[32] Lord CAIRNS in delivering the opinion of the House of Lords, said: "Although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed."

So in *Wilson & Sons* v. *Steamship Co.*,[33] the Court of Appeal, per Lord ESHER, said that "it was not intended by the Judicature Act to alter people's substantive rights. A larger power was given to the court by the new procedure as to joinder of parties; but that procedure ought, as it seems to me, to be administered with regard to the principles of the old law on the subject."

Accordingly, wherever a plea in abatement or a demurrer would have been proper under the old law on the ground of defect of parties defendant, a motion by defendants to dismiss *unless* the additional parties be brought in will be proper, or the plaintiff might of course make a motion for leave to amend by adding other defendants. And the same reasoning would apply to non-joinder of plaintiffs. In case of new plaintiffs being brought in pursuant to an order of the court, there would seem to be no insuperable objection to employing the equity rule in all cases and making a necessary party plaintiff a defendant if he refused to join voluntarily as a plaintiff. The broad

[29] 24 Colo. 20.
[30] Judicature Act, Chap. XII, Sec. 13.
[31] Sec. 9.
[32] [1879] 4 App. Cas. 504, 516.
[33] [1893] 1 Q. B. 422, 427.
[34] [1898] 2 Q. B. 380.

power conferred on the court to order in new parties in both law and equity actions would doubtless suffice to warrant such a proceeding. In *Cullen* v. *Knowles*,[34] the Queen's Bench Division ordered a joint promisee who refused to join as plaintiff, to be brought in as a defendant, and declared that the judgment could easily be adjusted to meet such a separation of plaintiffs. The New Jersey Practice Act, which concerns itself only with law actions, expressly authorizes one who should join as plaintiff to be made a defendant in the first instance if he refuses to join.[35] If compulsory joinder of missing plaintiffs were to be deemed proper under the Judicature Act, some form of process would be necessary in addition to the amendment of the declaration, just as in the case of the compulsory bringing in of ordinary defendants. In either case an amendment of the summons or rule to plead and service of the same would be necessary,[36] or the practice prescribed by old Circuit Court rule No. 6, now repealed, might be followed, a new writ being issued in the nature of a summons directed to the new parties sought to be added as defendants. So far as bringing in new parties goes, the new Act seems to add little to the old practice respecting new parties defendant, except to make the method more direct, but in respect to bringing in new parties plaintiff the new Act marks a substantial advance, for our court had always refused to permit amendments adding new plaintiffs.[37]

As for getting rid of superfluous parties, plaintiffs have long had the privilege of voluntarily dismissing as to any of the defendants upon payment of costs as to them, and thereupon amending their declarations accordingly.[38] But the same privilege has not been accorded in respect to dropping superfluous plaintiffs. It would seem as though so utterly technical and easily obviated a defect as misjoinder of plaintiffs would have been deemed amendable under our liberal statute of amendments which authorized the court "to amend any process, pleading, or proceeding * * * either in form or substance, * * * for the furtherance of justice, * * * at any time before judgment rendered therein,"[39] but the construction given to this statute has not permitted such amendment, but on the contrary our Supreme Court has held that "it is well settled that a misjoinder of plaintiffs is fatal."[40] So that the new Act will effectually destroy this useless and senseless rule of the common law.

[35] Practice Act, 1912, § 5.
[36] Follower v. Laughlin, 12 Abb. Pr. (N. Y.) 105.
[37] Wood v. Insurance Co., 96 Mich. 437.
[38] Old Circuit Court Rule 27, b.
[39] How. St. (2nd Ed.) § 12969.
[40] Rogers v. Raynor, 102 Mich. 473.

3. JOINDER OF PARTIES SEVERALLY LIABLE.

Under an old statute it has long been competent in this state to join as defendants any or all parties severally liable upon the same negotiable instrument,[41] and judgment might be rendered for or against any of the parties so joined.[42] This is a very common form of statute, found substantially in the great majority of the states which have adopted the code.[43] But the Judicature Act has superseded it, and in its place has provided that "It shall be lawful for any plaintiff to include in one action as defendants, all or any of the parties who may be severally or jointly and severally liable, and to proceed to judgment and execution according to the liability of the parties."[44] This is substantially the language employed in the English practice, except that our Act does not permit the joinder of parties alleged to be liable in the alternative.[45]

It broadens the former practice in several respects. In the first place the joinder is no longer confined to persons liable on bills of exchange or promissory notes. Nor is it even necessary that they be liable on the same instrument, whatever its character may be, as is so common in American statutes.[46] Several and joint and several promisors on any sort of an obligation, written or oral, come within the terms of the statute.

In terms the statute goes even farther than this. It does not confine the cases to which it applies to those arising on contract, but is broad enough to include all kinds of several or joint and several liabilities, one variety of which would be several liabilities of tort-feasors. The question arises, therefore, whether several tort-feasors can be joined under this statute and a judgment be recovered against such of them as are proved to be liable. But it would seem quite clear that unless radical changes are made in the rules as to joinder of causes of action, the several liabilities of several wrongdoers cannot be determined in a single action, because if the liability is several and not joint it must be a case where there is no community or co-operation in the wrongdoing, in which case there would be as many distinct and separate torts as there are parties who are severally under liability. When a number of parties, each acting separately, pollute a stream, they are severally and not jointly liable for the wrongful

[41] How. St. (2nd Ed.) § 12705.
[42] How. St. (2nd Ed. § 12707.
[43] See 15 Encyc. Pl. & Pr. 741.
[44] Chap. 12, Sec. 15.
[45] Order XVI, rule 4.
[46] 15 Encyc. Pl. & Pr. 741.

acts.[47] But to join them all in a single action would be not only a joinder of parties severally liable but a joinder of different causes of action, each one against a different defendant. Such a result could not have been contemplated by the statute now under discussion, for it purports to refer to the joinder of parties only. Even if a joint cause of action in tort is alleged against a number of defendants—and such a tort would of course in its nature be joint and several—if the proof should fail to establish the joint character of the tort there would at most appear to have been a number of separate torts committed by the several parties defendant, and if judgments were to be rendered against each in such a case, they would be separate judgments on distinct and different causes of action and not judgments establishing several liabilities on the same cause of action. Whether as a question of joinder of causes of action such a proceeding might be convenient and desirable is another matter, and its propriety would involve the sections of the Judicature Act covering joinder of actions.

4. INTERVENTION.

Intervention is a proceeding native to the civil law and familiar to the ecclesiastical and admiralty law, but not known in the early equity practice nor found among common law remedies. POTHIER defines it as "an act by which third person demands to be received as a party in a case formed between other parties, either to join with the plaintiff and demand the same thing he does or something connected with it, or to join with the defendant and oppose with him the demand of the plaintiff which he is interested in defeating."[48] CHITTY says that "in some courts a third person, not originally a party to the suit or proceeding, but claiming an interest in the subject matter, may, in order the better to protect such interest, interpose his claim, which is a proceeding termed in the Ecclesiastical Courts intervention. * * * Intervention is unknown in our Courts of Law and Equity, but is admitted in the practice of the Ecclesiastical Courts."[49] In modern equity practice, however, it has become common. Thus, in *Marsh* v. *Green*,[50] the Supreme Court of Illinois said that "any person feeling that he has an interest in the

[47] Cooley on Torts (3rd Ed.) 250.

[48] Oeuvres Complètes, Traité de la Procédure Civile, pt. 1, ch. 2, sec. 7, § 3.

The term does not appear in the Corpus Legum of Haenel, which would indicate that the proceeding was developed subsequent to Justinian's time.

[49] 2 General Practice (1st Am. Ed.) 492. See The Oregon, 45 Fed. 62, 76, for its use in admiralty.

[50] 79 Ill. 385.

litigation may apply to the court, and be permitted to intervene and become a party, and have his rights passed upon on the hearing." But in common law actions, where no statute creates such a right, no intervention has ever been permitted.[51]

The Judicature Act has given us a very broad statute on intervention, which provides that "In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[52]

This provision is fully as broad as the statutes of Louisiana,[53] Iowa,[54] California, [55] and a half dozen other states which have followed their lead, and should receive the same liberal interpretation which the courts of those states have almost universally given. In a leading case in Iowa,[56] arising under a statute substantially the same as ours, the plaintiff sued on two promissory notes in which he was named as payee. A third party filed a petition in intervention alleging that he was the real and beneficial owner of the notes, and that the plaintiff had no interest in them except the legal title. At common law two actions would have been necessary, for the plaintiff as the holder of the legal title would have been clearly entitled to recover, and the third party would then have had to sue him for money had and received. But the court, speaking through a very eminent lawyer and judge, John F. DILLON, held that the design of the statute was to prevent a multiplicity of actions, and since the third party was beneficially entitled to the avails of the suit it was proper for him to intervene and obtain a judgment for that which he was ultimately entitled to get.

The statute does not specify what interest or how great an interest is necessary to permit an intervention. Any interest is sufficient, and the fact that the intervenor may or may not be able to protect his interest in some other way is not material.[57] Accordingly, where an action was brought by an alleged owner of a tract of land condemned for public use to recover the award, third persons who claimed an interest in the land were permitted to intervene. The court said: "If the whole of the award should be paid over to the plaintiff, and

[51] See Rocca v. Thompson, *223* U. S. 317, for an interesting discussion of intervention.
[52] Chapter XII, Sec. 11.
[53] Garland's Rev. Code of Prac. §§ 389-394.
[54] Code, 1897, §§ 3594-3596.
[55] Code Civ. Pro., § 387.
[56] Taylor v. Adair, *22* Ia. *279*.
[57] Coffey v. Greenfield, 55 Calif. 382.

the fact should be that she was not entitled to the whole of it, but that the intervenors were severely entitled to a part of it, they could maintain actions against her to recover their shares. The fact that they might, at their election have a remedy against the city would not deprive them of this right of action. If this is so, why may not they intervene in this action, in order to have the award apportioned, and to recover their share? Why should they have to wait until the money was paid over to the plaintiff, and then sue her?"[58]

In a recent California case[59] the Supreme Court held that where property was attached as belonging to the defendant, a third person who claimed to own it might properly intervene in the action. Stockholders have been permitted to intervene to defend an action upon a note fraudulently executed by the officers of the company, when the company refused to defend.[60] A subsequent attaching creditor who has levied on property already levied upon in a prior action, may intervene to defeat the lien of the prior levy.[61] The purpose in all these cases is to simplify litigation and so far as possible dispose of an entire controversy and the rights involved in it or affected by it in a single action. But the intervenor's interest must be a legal or equitable one, and not a mere moral or sentimental interest for or against the record parties. The character of the interest which the intervenor must possess is well summarized by Mr. POMEROY in his work on Code Remedies as follows: "The intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least."[62]

5. CONSTRUCTION OF ACT.

The second section of the Judicature Act declares that the entire Act is remedial in character and as such shall be liberally construed to effectuate its intents and purposes. This section should have an important bearing upon the construction to be given and the scope to be accorded to the foregoing provisions relative to parties, for it at once frees the court from the shackles of the old rule that

[58] Smith v. City of St. Paul, 65 Minn. 295.

[59] Dennis v. Kolm, 131 Calif. 91.

[60] Majors v. Taussig, 20 Colo. 44. And see also State v. Holmes, 60 Neb. 39; Fitzwater v. Bank, 62 Kan. 163.

[61] McEldowney v. Madden, 124 Calif. 108.

[62] 4th Ed., § 324.

proceedings in derogation of the common law are to be strictly construed. It will therefore rest largely with the court to determine how far the new provisions are to be carried as remedial instruments. The experience of every procedural reform demonstrates the controlling influence of the court, for no statute can be so clearly worded that its scope and meaning is not largely dependent upon the sympathetic, indifferent or hostile attitude of the judiciary. With a Supreme Court already committed by a long and distinguished history to the doctrine that the best test of procedure is its efficiency and convenience rather than its historical regularity, the Judicature Act may well be expected to mark a new epoch in the administration of the law in Michigan.

(To be Continued)

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